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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENWONE DESHAWN
SMITH,

Defendant and Appellant.

B288064

(Los Angeles County
Super. Ct. No. BA439478)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Edmund Willcox Clarke, Jr., Judge.
Affirmed with directions.

George L. Schraer, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy
Attorneys General, for Plaintiff and Respondent.

A jury found Kenwone Deshawn Smith (Smith) guilty of forcible rape. On appeal, he contends there was insufficient evidence to support the penetration element of that crime. We reject that contention. However, we vacate his sentence and remand for resentencing based on recent legislation giving trial courts authority to strike a prior serious felony. We otherwise affirm the judgment.

BACKGROUND

I. The rape

In 2015, the 64-year-old female victim was living on the streets in the 500 block of North Western Avenue. Although store owners in that area saw the victim talking and yelling to herself, they had never seen her behave violently with others in the years they had known her.

On the morning of August 26, 2015, the victim's bloodied body was discovered in front of a business in the 500 block of North Western Avenue. Although alive, she had massive trauma to her face and head, was naked from the waist down, and was covered in urine and feces. A pool of dried blood was near her, and blood was on the wall. A nearby used condom was collected as evidence.

At the hospital, the severely injured victim had to be intubated.¹ Ann Allison, a forensic nurse, examined her on August 26, 2015. Because the victim was still unconscious, Allison obtained a limited history from law enforcement. By the

¹ After spending a month in the hospital, the victim was transferred to a nursing home and then to an assisted living facility where she remains wheelchair-bound. She did not testify at trial.

time Allison began her examination, the victim's hands and genital area had been washed. The nurse was unable to look at the inside of the victim's mouth but was able to swab the inside of her cheek. The nurse examined the victim's genital area but could not insert a speculum and therefore was unable to obtain a cervical swab. The nurse swabbed the victim's external genitalia, inside her vagina, and anal area.

All exterior swabs tested negative for sperm cells. All items from the sexual assault kit tested negative for semen, including the vaginal, anal, and external genital swabs. No spermatozoa was found on the interior or exterior of the condom. However, the victim's DNA was on the condom's exterior and interior, although it could not be determined from where on the victim's body the cells came.

When DNA at the crime scene implicated Smith, he was arrested. Following his arrest, he gave a recorded statement to the police which was admitted at trial. Smith said he was walking on Western when a woman tried to assault him. He punched her, mainly in the face, until she was unconscious. Then he dragged her to the corner of a building, where he hit and choked her. Smith removed the victim's pants. He put on a condom and tried to have sex with her, but he claimed that "[i]t just wasn't going in," and he did not penetrate her. He rolled the victim onto her stomach and tried again, but he again said that "[i]t didn't go in." Although he rubbed his penis against her vagina "like, seven times" "trying to get it in," he asserted that he was unsuccessful. However, he admitted, "probably when [he] rubbed on it, it probably opened up one of the lips by rubbing on it, you know, trying to get it in." He also tried to have the victim

orally copulate him but “it didn’t work” and he could not get his penis into her mouth.²

II. Procedural background

A jury found Smith guilty of kidnapping with intent to commit rape (Pen. Code, § 209, subd. (b)(1); count 1),³ forcible rape (§ 261, subd. (a)(2); count 2), assault with intent to commit a felony (§ 220, subd. (a)(1); count 3), and attempted willful, premeditated, deliberate murder (§§ 664, 187, subd. (a); count 4). As to count 2, the jury found true allegations that Smith’s movement of the victim substantially increased the risk of harm to her above the level of risk necessarily inherent in the underlying offense (§ 667.61, subds. (a) & (d)(2)), and that he personally inflicted great bodily injury (§ 667.61, subds. (a) & (d)(6)).

On December 15, 2017, the trial court sentenced Smith, on count 2, to life with a minimum parole eligibility of 50 years based on a prior strike conviction. The trial court sentenced him to life with a minimum parole eligibility of seven years on count 4.⁴ The trial court imposed two 5-year terms for prior serious felony convictions under section 667, subdivision (a), on counts 2 and 4 for a total of 10 years. The trial court imposed but stayed the sentences on counts 1 and 3 under section 654.

² Video surveillance from a nearby store caught the assault.

³ All further statutory references are to the Penal Code.

⁴ The trial court granted Smith’s *Romero* motion as to count 4 only. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

DISCUSSION

I. Sufficiency of the evidence

Smith contends there was insufficient evidence of forcible rape (count 2). We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, “ “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” ’ ” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) “We . . . presume in support of the judgment the existence of every fact . . . the trier of fact could reasonably deduce from the evidence.” (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Reversal is not warranted unless it appears “ ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “ ‘The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence.’ ” (*People v. Brown* (2014) 59 Cal.4th 86, 106.)

Here, Smith contends only that there was insufficient evidence of sexual penetration, an element of the crime of forcible rape. That is, forcible rape requires the People to prove that the defendant had sexual intercourse with a woman not his wife without her consent, and the defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else. (§ 261, subd. (a); CALCRIM No. 1000.) “Sexual intercourse means any penetration, no matter how slight, of the

vagina or genitalia by the penis.” (CALCRIM No. 1000, italics omitted; § 263.) Vaginal penetration is not required (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371; *People v. Karsai* (1982) 131 Cal.App.3d 224, 232), nor is ejaculation (*People v. Wallace* (2008) 44 Cal.4th 1032, 1079). Rather, penetrating the external genital organs constitutes sexual penetration and completes the crime of rape even if the rapist does not thereafter succeed in penetrating the vagina. (*Karsai*, at pp. 231–232.) In *Karsai*, the victim felt the defendant’s penis in the area of her private parts and “‘between [her] lips,’” although not inside her vagina. (*Id.* at p. 233.) This was sufficient evidence of sexual penetration, as sexual intercourse requires proof of penetration of the labia majora, not the vagina. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097; *Quintana*, at p. 1371.)

Here, Smith’s statement provided sufficient evidence of sexual penetration: he said that when he was trying to penetrate the victim, he “opened up one of the lips by rubbing on it.” Under the above authority, Smith therefore penetrated at least the victim’s external genitalia.⁵ Although Smith’s statement alone was sufficient to establish the penetration element of the crime, there was other evidence supporting sexual penetration. The entirety of Smith’s statement, for example, establishes that he repeatedly and violently tried to penetrate the victim’s vagina. He was able to put on a condom, which had the victim’s DNA on and in it. Although it could not be established from where on the victim’s body the DNA came, it is reasonable to infer it was from the victim’s genital area based on evidence Smith, before putting

⁵ A woman’s external genitalia has two outer folds called the labia majora and inner folds called the labia minora.

on the condom, rubbed his penis against the victim's genital area in an attempt to penetrate her vagina. This evidence, combined with Smith's statement, is sufficient to establish the crime of forcible rape.

II. Sentencing

Smith's sentence includes terms for a prior serious felony conviction under section 667, subdivision (a). When Smith was sentenced in 2017, the trial court lacked discretion to strike that enhancement. However, recent legislation grants trial courts the discretion they once lacked. Effective January 1, 2019, the Legislature amended sections 667 and 1385 to allow trial courts to exercise discretion to strike or to dismiss a prior serious felony conviction for sentencing purposes. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.), Stats. 2018, ch. 1013, §§ 1–2.) The amendments apply to cases, such as this one, not final when the amendments became operative. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 972.)

The People agree the amendments are retroactive to Smith's case but disagree that remand is proper. Instead, the People point to the trial court's statements and sentencing choices as indicators the trial court would not have stricken the enhancement had it known it had discretion to do so. The trial court, for example, said, in connection with denying Smith's *Romero* motion, that this "case is an example where the facts are numerous and supportive of almost anything the prosecutor would argue." The trial court referred to Smith as a person who "can do things to people and feel nothing." Because of the "heinous" nature of Smith's crimes, the trial court was "extremely cautious about avoiding the penalty that [the laws of the State of California] have decided should go with this conduct."

Thereafter, before imposing sentence, the trial court “made it clear” that the “conduct here is so devoid of humanity and caring that I feel the legislature speaking for the public would say to give the sentence that I have described.” However, in addition to these statements, the trial court specifically discussed whether it could strike the five-year prior, concluding it could not. Given the trial court’s specific statements about its inability to strike the prior serious felony enhancement, we conclude that remand is necessary. We express no opinion on how the trial court’s discretion should be exercised on remand.

Because we vacate the sentence and remand for resentencing, Smith’s contention that the trial court could not impose the five-year prior twice is moot.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.